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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 662

ETS-HOKIN & GALVAN, INC., a Foreign Corporation,
Petitioner,

v.

MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as Lawrence Transportation, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals is reported in 380 F.2d 258 (8th Cir. 1967). The unreported opinion of the District Court is reproduced in Petitioner's Brief as Appendix B.

JURISDICTION

The jurisdictional grounds are set forth in Petitioner's Brief.

QUESTIONS PRESENTED

1. When a contract is entered into for a carriage of goods on a haul asserted by a state regulatory agency to be an intrastate movement for rates prescribed in tariffs filed with the state regulatory body and when

tariffs providing identical rates are thereafter filed with Interstate Commerce Commission and subsequently after the services have been rendered, the movement is determined by a federal three-judge court to be interstate, may the carrier recover the contract price?

2. Does the prior course of conduct of the Petitioner during the performance of the contract for interstate carrier service and prior to this litigation estop it from raising the question of the invalidity of the contract?

3. Does the fact that the Petitioner made application to and received from the United States Air Force a large amount of money for cable delay and out-of-sequence cable alleging in support thereof the non-negotiability of the Respondents' claim, render the Petitioner's position here devoid of equity?

4. Is the Petitioner prevented from raising the question of invalidity of the contract for the first time on appeal?

STATUTES INVOLVED

(1) *Section 216 (a) of the Interstate Commerce Act, Part II; Motor Carriers* (Feb. 4, 1887, c. 104, Pt. II, § 216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, § 22 (b-d), 54 Stat. 924; Aug. 24, 1962, Pub. L. 87-595, § 1, 76 Stat. 397.) 49 U.S.C.A. § 316 (a):

(a) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and

to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters, relating to or connnected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(2) *Section 216 (b) of the Interstate Commerce Act, Part II; Motor Carriers* (Feb. 4, 1887, c. 104, Pt. II, § 216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, § 22 (b-d), 54 Stat. 924; Aug. 24, 1962, Pub. L. 87-595, § 1, 76 Stat. 397.) 49 U.S.C.A. § 316(b):

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

STATEMENT OF CASE

The Respondent wishes to add to the Statement of Case as presented by the Petitioner, the following facts:

In April of 1963, the Petitioner filed with the United States Air Force an application for additional compensation for hauling out-of-sequence cable and cable delay. In its application, the Petitioner stated that the incurred costs due to out-of-sequence cable and cable delay were subject to carrier rates established by governmental agencies and were not subject to negotiation between contractor and carrier (P. Ex. 133, E. 225-245, R. 275; P. Ex. 141, E. 254, R. 462). Based upon this application, the United States Air Force allowed additional compensation to the Petitioner. (P. Ex. 147, E. 266, R. 462).

At the time of the commencement of the carrier haul in August of 1962, the Respondent, Maas Transport, Inc., had on file with the North Dakota Public Service Commission a tariff providing for rates on a weight basis (P. Ex. 2, R. 60-75, 59). Identical tariffs were subsequently filed with the Interstate Commerce Commission (P. Ex. 6, R. 97, 98). In May of 1963, the North Dakota Public Service Commission declared that the carrier services being rendered in the installation of the communication system on the Minot, North Dakota, missile complex were intrastate in character (P. Ex. 138, E-249, R. 396). Not until October 21, 1963, was the question of whether this was an interstate or intrastate haul decided by a three-judge Federal Court. See *Great Northern* v. *Thompson*, 222 F. Supp. 573 (D.N.D. 1963).

REASONS FOR DENYING THE WRIT

I.

A Contract Entered Into for a Carriage of Goods on a Haul Asserted by a State Regulatory Agency To Be an Intrastate Movement for Rates Prescribed in Tariffs Filed With the State Regulatory Body and When Tariffs Providing Identical Rates Are Thereafter Filed With the Interstate Commerce Commission and Subsequently After the Services Have Been Rendered, the Movement Is Determined by a Federal Three-Judge Court To Be Interstate, Is Enforceable by the Carrier.

In the case of *Harris* v. *Runnels,* 12 How. 79, 13 L. Ed. 901 (1851) this Court stated that prior to deciding whether a contract in violation of the terms of the statute was void, the Court would look to the legislative intent or purpose behind the statute. See also, *McCullough Transfer Co.* v. *Virginia Sur. Co.,* 213 F.2d 440 (6th Cir. 1954); *Macco Const. Co.* v. *Farr,* 137 F.2d 52 (9th Cir. 1943); *Guffey-Gillespie Oil Co.* v. *Wright,* 218 Fed. 787 (8th Cir. 1922); *Talco Capital Corp.* v. *Canaveral Int'l Corp.,* 225 F. Supp. 1007 (S.D. La. 1964), *affirmed,* 344 F.2d 962; Anno., 55 A.L.R. 2d 497.

It is respectfully submitted that in the interpretation of the provisions of the Part II of the Interstate Commerce Act entitled "Motor Carriers," 49 U.S.C. §§ 301 et seq., decisions of this Court and the "National Transportation Policy" must be considered.

In 1940, Congress amended the Interstate Commerce Act by inserting before Part I thereof the following provision entitled "National Transportation Policy":

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act

> [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899 (1940), 49 U.S.C., hist. note preceding §§ 1,301.

This Court has stated that the requirement of the Interstate Commerce Act, that tariff rates filed with the Commission must be enforced, is to prevent rebates and preferential treatment. *Dayton C. & I. Co.* v. *Cincinnati N.D. & T. T. R. Co.,* 239 U.S. 446, (1915).

The Petitioner, Ets-Hokin & Galvan, Inc., has cited numerous decisions in its brief stating that contracts in violation of the Interstate Commerce Act are void. However, each of the cases cited by the Petitioner insofar as they have any application to this case are cases wherein the contract involved called for a tariff rate different from those on file with the Interstate Commerce Commission. In each case, discrimination or rebates were involved. This is not the case in the instant proceeding.

At the commencement of the carrier haul out of which this case arose, the Respondent, Maas Transport, Inc., had on file with the North Dakota Public Service Commission an intrastate tariff. Subsequently, the identical tariff was filed with the Interstate Commerce Commission and became effective on November 8, 1962. The contract here at issue was terminated unilaterally by the Petitioner in March of 1963. On May 3, 1963, the North Dakota Public Service Commission declared the haul to be intrastate in character. Not until October 21, 1963, was the question of whether this was an interstate or intrastate haul decided. See *Great Northern* v. *Thompson,* 222 F. Supp. 573 (D. N.D. 1963).

There is no question of discrimination or rebate involved here. The rates charged under terms of the oral contract were identical to the tariffs on file with the North Dakota Public Service Commission and subsequently filed with the Interstate Commerce Commission.

A carrier has a right to a fair return on his property or investment even though the rates or fares charged by such individual are subject to public regulation. This rule is necessary to avoid the confiscation of property without just compensation. *Pacific Gas & E. Co.* v. *City & County of San Francisco,* 265 U.S. 403 (1924); *Los Angeles Gas & Elect. Corp.* v. *Railroad Comm.,* 289 U.S. 287 (1933).

II.

The Prior Course of Conduct of the Petitioner During the Performance of the Contract for Interstate Carrier Service and Prior to This Litigation Estops It From Raising the Question of the Invalidity of the Contract.

> "That Defendant's acts, representations, and omissions (including the acceptance and solicitation of Plaintiff's services, and silence as to complaints, now made, and tacit and expressed approval as to some of the actions of Plaintiff which constitute the grounds of such alleged complaints) successfully secured to it the continuous services of Plaintiff, which services were essential to the performance and completion of Defendant's own obligations under its prime contract, during all of which time the Plaintiff believed and had reasonable cause to believe, that such services (performed in good faith by Plaintiff) were wholly satisfactory and were being performed and furnished at an agreed price—which understanding and belief of the Plaintiff was known to Defendant, and was due to the actions, representations, and omissions aforesaid on the part of the Defendant, and which were relied upon by Plaintiff." (Finding of Fact No. 15, R. 490). See also, Appendix B, Petitioner's Brief, 17-18.

The Finding of the trial court was affirmed by the Court of Appeals. See *Ets-Hokin & Galvan, Inc.* v. *Maas Transport, Inc. and B. L. Lawrence, d/b/a Lawrence Transportation,* 380 F.2d 258 (8th Cir. 1967).

In *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959), the Respondent induced the Petitioner to delay suing by representing to the Petitioner that he had seven years in which to sue. In stating that the Respondent could not rely upon the three year federal statute of limitations, this Court, quoting

from *Insurance Co.* v. *Wilkinson,* 13 Wall. 222, 223, 20 L. Ed. 617, stated:

> "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim." *Supra* 359 U.S. at 234.

III.

The Fact That the Petitioner Made Application To and Received From the United States Air Force a Large Amount of Money for Cable Delay and Out-of-Sequence Cable Alleging in Support Thereof the Non-Negotiability of the Respondents' Claim, Rendered the Petitioner's Position Devoid of Equity.

In April of 1963, the Petitioner filed with the United States Air Force an application for additional compensation for hauling out-of-sequence cable and cable delay. In its application, the Petitioner stated that the incurred costs due to out-of-sequence cable and cable delay were subject to carrier rates established by governmental agencies and were not subject to negotiation between contractor and carrier. Based upon this application, the United States Air Force allowed additional compensation to the Petitioner.

The trial court found that:

> "The Defendant's position is devoid of equity." (Finding of Fact No. 16, R. 490.)

This finding was affirmed by the Court of Appeals. See *Ets-Hokin & Galvan, Inc.* v. *Maas Transport, Inc. and B. L. Lawrence, d/b/a Lawrence Transportation, supra.*

IV.

The Petitioner Is Prevented From Raising the Question of Invalidity of the Contract for the First Time on Appeal.

The Respondents take the position that Petitioner raised the issue of illegal contract for the first time on appeal. It agreed that there is an amount due and owing to the Respondents, but alleged that the amount claimed by the Complaint was grossly overstated. (Para. 3, Second Amended Answer to Plaintiff's Complaint, R. 10).

Illegality of the contract was not an issue raised by the pleadings. It was not an issue before the trial court. Therefore, it was an improper argument before the Court of Appeals. *Walters* v. *City of St. Louis, Missouri,* 347 U.S. 231 (1954).

The only issue raised by the pleadings and the only issue tried was the amount owed by Petitioner to the Respondents. It is submitted that this was the only proper issue on appeal.

CONCLUSIONS

In conclusion, it is the Respondents' contention that:

1. The oral contract out of which this case arose is in conformity with the policy of the Interstate Commerce Act and with decisions of this Court. It is sub-

mitted that enforcement of this contract does not involve discriminations, preferences or rebates which the Interstate Commerce Act was designed to prevent, but instead provided a reasonable compensation to a carrier who under the circumstances attempted to and did comply with both the provisions of the State Regulatory Agency and the Interstate Commerce Commission.

2. The Petitioner, by its prior cause of conduct during the performance of the contract for Interstate carrier service and prior to this litigation, is estopped from raising the questions of the invalidity of the contract.

3. The Petitioner's position is devoid of equity. It is submitted that the Petitioner should not be allowed to retain the benefits received as a result of its application to the United States Air Force for additional compensation alleging in support thereof the non-negotiability and validity of the Respondents' claim and here deny the validity of such claim.

4. In its answer to the Respondents' Second Amended Complaint, the Petitioner admitted that a sum was due to the Respondents. The question of the invalidity of the contract was not raised until the appeal of the District Court Decision. It is submitted that it was not proper for this issue to be raised for the first time on appeal and that therefore the question is not properly before this Court.

For the foregoing reasons the Respondents respectfully submit that the Writ should be denied.

Dated at Williston, North Dakota this 13th day of October, 1967.

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